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No. 89-1215

Supreme Court, U.S.
FILED
MAY 23 1990
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1989

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, *et al.*,

Petitioners,

vs.

JOHNSON CONTROLS, INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF THE STATE OF CALIFORNIA AND THE CALIFORNIA FAIR EMPLOYMENT & HOUSING COMMISSION AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE

Pursuant to Sup.Ct.R. 36.2, the State of California, by its Attorney General, and the California Fair Employment & Housing Commission respectfully submit this brief as *amici curiae* in support of Petitioners. The parties have consented to the filling of this brief, and their letters of consent are being filed with the Clerk of the Court, Sup.Ct.R. 36.2.

Johnson Controls, Respondent herein, has contended that California's Fair Employment and Housing Act, Cal. Gov. Code § 12900 *et seq.*, like Title VII, should excuse its categorical exclusion of women in the interest of fetal protection. Rejecting the reasoning of the federal courts on the issue, Amicus California Fair Employment and Housing Commission refused to recognize the asserted defense, ruling that Johnson's fetal protection program (FPP), the same FPP at issue herein, constituted unlawful sex discrimination. *Department of Fair Employment and Housing v. Globe Battery, A Division of Johnson Control,* FEHC Dec. No. 87-19, 1987-88 CEB Precedential Decisions 9 (1987). That decision was upheld by the California Court of Appeal. *Johnson Controls, Inc. v. California Fair Employment and Housing Commission,* 218 Cal.App.3d 517, 267 Cal.Rptr. 158 (1990).[1]

Amici submit this brief out of a concern that California's female employees will not be accorded the protections against sex discrimination provided by Title VII of

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[1] Johnson's petition for discretionary review by the California Supreme Court was denied by that court on May 17, 1990.

the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* While Amici believe that the public has an interest in workplace fetal safety, Amici believe that this public interest must be reconciled with the public's substantial interest in equal employment opportunities for women. Amici contend that it is for Congress, and not for the courts or employers, to consider these competing public interests and to change the balance if concern for fetal protection is to outweigh concern for equal employment opportunity.

ARGUMENT

THE COMPETING PUBLIC INTERESTS AFFECTING WORKPLACE FETAL SAFETY CANNOT BE BALANCED WITHIN THE FRAMEWORK OF TITLE VII LITIGATION, AND THE DECISION WHETHER SEX DISCRIMINATION SHOULD BE EXCUSED IN THE INTEREST OF FETAL SAFETY SHOULD BE LEFT TO CONGRESS

There is no question that society has a legitimate and significant interest in workplace fetal safety. The question presented here is whether employers generally, and Johnson Controls (Johnson) in particular, should be permitted to assert that societal interest as justification for sex discrimination. More precisely, the question is whether the courts should construe Title VII to incorporate a defense to sex discrimination predicated upon fetal safety.

Once an employer decides to exclude women from the workplace in asserted furtherance of fetal protection, the issue is necessarily one within the contemplation of Title VII. However, courts applying Title VII are not

equipped to resolve the fundamental policy disputes which attend consideration of such categorical discrimination. Nevertheless, rather than leave it to Congress to determine fundamental policy on this point, the federal courts, no doubt with good intentions, have chosen instead to determine policy themselves. This have given rise to manifestly result-oriented analytical methodologies that contort Title VII and employment discrimination law out of all recognizable proportion. Indeed, with all respect, the extent to which the circuit courts have gone out of their way to *circumvent* settled law belies any pretense at judicial *enforcement* of congressional intent.

Because of the analytical havoc that has been wrought by the circuit courts endeavoring to justify this form of sex discrimination, and for fundamental policy reasons, Amici respectfully urge this Court to reverse the decision of the Seventh Circuit, and hold that voluntary adoption of a fetal protection program does not excuse categorical exclusion of women.

A. Judicial Treatment Of Sex Discrimination Predicated Upon Fetal Protection Has Been Ill-Reasoned And Manifestly Result Oriented

The history of this issue in the circuit courts has been one of attempting to circumvent the Pregnancy Discrimination Act (PDA), Pub.L. 99-555, §1, 92 Stat. 2076 (1978). That Act described discrimination "because of sex" or "on the basis of sex" to include, without limitation, "because of or on the basis of pregnancy, childbirth, or related medical conditions." 42 U.S.C. § 2000e(k) (1982).

Under the PDA, "women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes . . . as other persons not so affected but similar in their ability to work." (*Ibid.*)

The PDA was enacted for the specific purpose of overcoming this Court's decisions in *General Electric v. Gilbert*, 429 U.S. 125 (1976) (*Gilbert*) and *Nashville Gas Co. v. Satty*, 434 U.S. 136 (1977) (*Satty*). *See* H.R.Rep. No. 95-948, 95th Cong., 2d Sess. 6, *reprinted in* 1978 U.S. Code Cong. Admin. News 4749, 4751; S.Rep. No. 95-331, 95th Cong., 2d Sess. 2, *reprinted in* 1978 U.S. Code Cong. Admin. News 4749, 4750; *see also California Federal S & L v. Guerra*, 479 U.S. 272, 277 (1987). After enactment of the PDA, it would seem obvious that *potential pregnancy*, like pregnancy itself, could not be used as a basis for excluding women except upon satisfaction of the proof required to excuse sex discrimination itself. Under Title VII, discrimination on the basis of sex is permissible "where sex . . . is a bona fide occupational qualification reasonably necessary to the normal operation of [the] particular business or enterprise." 42 U.S.C. § 2000e-2(e)(1) (1982).

Nevertheless, both the Fourth and the Eleventh Circuits devised convoluted methodologies to avoid clear congressional intent, in order to treat exclusion of women for fetal protection as "gender neutral" practices having only an incidental disparate impact on women. The purpose of these efforts was to afford the employer the opportunity to defend categorical exclusion of women as a "business necessity." The courts recognized that if fetal protection programs (FPP's) were treated as disparate treatment sex discrimination, the employer would have to

prove that sterility or non-pregnancy was a bona fide occupational qualification (bfoq).

The Fourth Circuit's decision in *Wright v. Olin Corp.*, 697 F.2d 1172 (4th Cir. 1982) (*Wright*) is complicated by the fact that the FPP there in issue was alleged by the plaintiffs to be one part of a pervasive scheme of policies and practices by Olin which were deliberately designed to deny women job opportunities. See 697 F.2d 1172, 1178, 1179. The allegations of these practices and policies, taken as a whole, appeared to present a "classic" case of covert discrimination in the mode of *McDonnell Douglas v. Green*, 411 U.S. 792 (1973), the employer denying any discriminatory motive in the creation of any of the challenged programs and policies.

Olin Corporation, therefore, relying on *McDonnell Douglas*, met the plaintiffs' allegations of discriminatory intent by proffering a purportedly nondiscriminatory business reason, viz., fetal protection. The employer then contended that the plaintiffs failed to prove disparate treatment, because they failed to prove that the proffered business reason was pretextual. 697 F.2d at 1183.

The claimants argued, however, that *McDonnell Douglas* had no application for consideration of the FPP because the very existence of the program creates, not a *rebuttable* presumption of discriminatory purpose, but an *irrebuttable* presumption of such a purpose; the program on its face applies only to women, and was never intended otherwise. 697 F.2d at 1183. In other words, claimants had made out not only a *prima facie* case of sex-based discrimination; they had proved *overt* discrimination. In such a case, the employer had the burden, not merely of

going forward with evidence to meet a prima facie showing by the plaintiffs, but the burden of presenting an affirmative defense to proven discrimination.[2]

The conflict between the parties, then, was whether, at trial, Olin had the burden merely of articulating a nondiscriminatory business reason for the FPP (*McDonnell Douglas*), or, instead, had the burden of proving an affirmative defense, by a preponderance of the evidence – whether the defense be proof of a "bfoq" or proof of "business necessity."[3]

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[2] Olin's FPP imposed a burden on women which did not fall at all on men. Moreover, the claimants argued, it is a burden which was imposed *only* on women. The claimants, therefore, argued that the FPP constituted gender-based disparate treatment, rather than merely "disparate impact" under this Court's *Gilbert-Satty* formulation, requiring Olin to prove that lack of child-bearing capacity is a bfoq. 697 F.2d at 1183. Alternatively, claimants argued, even if the FPP were treated as discrimination only on the basis of pregnancy rather than on the basis of gender – a material distinction following *Gilbert* – Olin must still justify the program by affirmative proof of business necessity, since the program manifestly has a disproportionately adverse impact on women. 697 F.2d at 1183-1184. Furthermore, claimants appear to have argued, even if the FPP were treated as "disparate impact" discrimination *prior* to enactment of the PDA, the program should be treated as disparate treatment *after* the enactment. See, 697 F.2d at 1183, n. 17.

[3] Since this Court's opinion in *Wards Cove Publishing Co. v. Atonio*, ___ U.S. ___, 104 L.Ed.2d 733 (1989), the "business necessity" justification for disparate impact discrimination is no longer an affirmative defense at all. Following *Wards Cove*, the employer has the burden only of producing evidence of a

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As the court saw it, if discrimination on the basis of pregnancy were treated as "disparate treatment," then fetal safety would not suffice as a business necessity to prove the defense of bfoq – "properly applied." 697 F.2d at 1185, n. 21. If, however, discrimination on the basis of pregnancy were treated as incidental discrimination on the basis of a gender-neutral factor (per *Gilbert*), then fetal safety could be raised as a business necessity under the "wider" standard. (*Ibid.*)

Congress' enactment of the PDA, of course, made it statutorily untenable to treat discrimination on the basis of pregnancy as "gender-neutral," and required proof that categorical discrimination against the subclass of women (pregnant women) was justifiable on the ground that non-pregnancy was a bona fide occupational qualification. In order to avoid the impact of the PDA, therefore, the court had to ignore the Act; the court, accordingly, did so – expressly. 697 F.2d at 1183, n. 17.

The court's justification for this action was essentially that the distinction between facial discrimination and incidental discrimination should not stand in the way of permitting an employer to raise fetal safety as a justification for discriminating on the basis of pregnancy. 697 F.2d at 1185, n. 21 ("The inappropriateness of applying the overt discrimination/b.f.o.q. theory of claim and

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business justification in order to meet a prima facie case of disparate impact discrimination. 104 L.Ed.2d at 753. California, by regulation, still treats the "business necessity" defense as an affirmative defense. Cal. Code Regs., tit. 2, § 7286.7(b).

defense . . . is that, properly applied, it would prevent the employer from asserting a justification defense which under Title VII doctrine it is entitled to present.") Treating the two forms of discrimination as nothing more than "semantic quibbling" (697 F.2d at 1186), the court simply chose that side of the "quibble" which it believed would permit the employer to raise fetal safety as a defense.

Thus, although the court found it to be "semantic quibbling" to quarrel over the *effects* of the discriminatory practice on women, the court obviously believed the *defenses* to be *substantively* distinguishable, characterizing the "disparate-impact business necessity" defense to be "obviously wider" than the bfoq defense. 697 F.2d at 1185, n. 21.[4] Even were it conceptually possible to have a

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[4] The "business necessity" defense is concerned with facially neutral rules, standards, and criteria, rather than with class-based exclusion, and it is conceivable that a business justification which would not suffice as a bfoq for class-based disparate treatment might, nevertheless, suffice under the "disparate impact/business necessity" standard. But even the abstract logic of such a possibility vanishes when what is at issue is not a rule, standard, or criterion which *might* disproportionately exclude members of a protected class, but rather a determinative, if conceptually "neutral," trait or condition such as pregnancy or child-bearing capacity, which, if it excludes anyone, can *only* exclude members of a protected class. In such a case, it is, indeed, "semantic quibbling" to argue any distinction between a "disparate impact" on the class (women) and "disparate treatment" of that class; the "neutral" trait or condition is but a proxy for membership in the protected class itself. This was evidently the conclusion of Congress in responding to this Court's rationale in *Gilbert*. See *International Union, supra* 886 F.2d at 909 (dis. opn. of Easterbrook, J.)

"semantic quibble" with substantively different consequences, one would assume that, in view of the policies behind Title VII, the substantive consequences of the "quibble" would devolve to the benefit of the adversely affected employees. Nevertheless, the Fourth Circuit concluded that substantive consequences of this "quibble" should devolve to the benefit of the employer.[5]

Ignoring the PDA, the court characterized the employer's pregnancy-based policy as being "literally expressed in gender-neutral terms, [but having] as its obvious and indisputably intended consequence the imposing upon women of a 'substantial burden that men need not suffer.' " 697 F.2d at 1186. Under that characterization, the court reasoned, the "disparate impact/business necessity" approach of this Court in the *Satty* case would apply. *Ibid.*

The Eleventh Circuit in *Hayes v. Shelby Memorial Hosp.*, 726 F.2d 1543 (11th Cir. 1984) (*Hayes*) took a somewhat different, though equally result-oriented, tack in analyzing a gender-based fetal protection program.[6] The court conceded, at least superficially, that after enactment

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[5] Having characterized the "business necessity" defense as "obviously wider" than the bfoq defense, the court suggests that defending on the basis of bfoq or "business necessity" is really only a matter of litigation strategy within the election of the employer. 697 F.2d at 1185, n. 21. With all respect, the suggestion is preposterous; even if the defense were a matter of choice, why would an employer ever *choose* to rely on what the court concedes is far a more difficult defense to prove?

[6] The court agreed with the *result* in *Wright*, but, in view of the PDA, sought to present a "clearer" methodology. *Hayes*, 726 F.2d at 1546, n. 2.

of the PDA, discrimination on the basis of pregnancy was categorical discrimination on the basis of sex, on a par equal to discrimination on the basis of race. 726 F.2d at 1546-1547, 1547-1548. The court also recognized that, given the express statutory equivalency of pregnancy-based discrimination and discrimination on the basis of sex, an employer can defend on the basis of a bona fide occupational qualification only by proving a connection between pregnancy or potential for pregnancy and the essence of the business operation. 726 F.2d at 1549. The court agreed with the district court that " '[p]otential for fetal harm, unless it adversely affects a mother's job performance, is irrelevant to the bfoq issue.' " *Ibid.*

But, like the Fourth Circuit, the *Hayes* court perceived the standard of "business necessity," required to excuse adverse impact discrimination, to be less than that required to prove a bfoq. This court too, then, sought to fashion a methodology which would make the employer's pregnancy-based discrimination a facially neutral practice with only an "incidental" disparate impact.

Accordingly, having paid "lip service" to the PDA, the court proceeded as though the Act did not exist: The court began its analysis by stating that discrimination on the basis of pregnancy creates only a *rebuttable presumption* of sex discrimination:

> We begin by establishing a *presumption* that if the employer's policy by its terms applies only to women or pregnant women, then the policy is facially discriminatory. That presumption may be rebutted, however, if the employer can show that it effectively and equally protects the offspring of all employees. In other words, the employer must show (1) that there is a substantial risk of harm to the fetus or potential offspring of women employees from the women's exposure, either during pregnancy or while fertile, to toxic hazards in the workplace, and (2) that the hazard applies to fertile or pregnant women, but not to men. 726 F.2d at 1549.

The court thus reasoned that a policy which excludes only women from jobs, though *manifestly* discriminatory on the basis of gender, is "really" gender-neutral, if the reason for firing only women is to protect offspring, and if the firing of women for this reason protects the offspring of both the male and female employees. And, the court explained, an employer can show that the offspring of both the male and female employees are "protected" by showing that the job is hazardous to the fetus but not to reproductive cells. Since both women and men carry reproductive cells, but only women carry the fetus, the policy is "neutral" because only those who carry fetuses are excluded from the jobs.[7]

Disregarding, for the moment, the lack of any apparent logical connection between the exclusionary policy and protection of the offspring of male employees, the

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[7] Of course, since the relevant pool of employees is all those employees having the jobs from which only women are excluded, such a policy can be said equally to *protect* the offspring of the male employees in such jobs only upon a showing that all of the male employees in those jobs are sexually involved with all of the female employees in those jobs. Otherwise, the policy of excluding only women from the jobs cannot fairly be said to "protect" the offspring of the male employees at those jobs; all that could be said is that the policy is *irrelevant* to any offspring of those male employees.

Hayes analysis is itself gender-biased. Under the FPP, female employees "enjoy" both the benefit and the burden of a program designed to further fetal safety. In the court's view, what converts such a program from gender-specific to gender-neutral discrimination is the additional benefit of the program *to men*; the burden of the program *on women* is, thus, immaterial to this formulation. The Eleventh Circuit cited to no authority for its "disparate-burden/egalitarian-benefit" analysis.

The *Hayes* reasoning is little more than a return to the discredited *Gilbert-Satty* distinction between discrimination on the basis of pregnancy *qua* pregnancy and discrimination on the basis of gender.[8] In *Gilbert*, this Court

[8] Although the Eleventh Circuit facially rejected the *McDonnell Douglass* "pretext" methodology (726 F.2d at 1547-1548), the court nevertheless adopted a hybridized form of that analysis. Under *Hayes*, discrimination on the basis of pregnancy makes out a "prima facie" case of sex discrimination which can be rebutted by an assertion that the discrimination was for the purpose of fetal protection. Pregnancy-based discrimination is sex discrimination, under Hayes, only if the pregnancy is, in effect, found to be a pretext for "real" sex discrimination, i.e., if it appears there is no demonstrable need for fetal protection, or if it is shown that the fetal offspring of male employees are also at risk, but male employees are not excluded from the jobs. Under *McDonnell Douglas*, the burden would be on the plaintiff to prove pretext; under *Hayes*, it would appear that the employer has the burden of proving that pretext does not exist. Thus, despite Congress' efforts to eliminate the distinction drawn in *Gilbert* between discrimination based on pregnancy and discrimination based on sex, the *Hayes* court permits an employer to demonstrate that discrimination based on pregnancy is not discrimination based on sex. Indeed, congressional enactment of the PDA is largely irrelevant to the

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stated that discrimination based on pregnancy qua pregnancy was facially neutral; in *Satty*, the Court found that such a "facially neutral" basis for discrimination must be justified by proof of business necessity if it "impose[s] on women a substantial burden that men need not suffer." *Satty, supra*, 434 U.S. at 142. The *Hayes* court reversed the order: If a fetal protection program imposes on women a burden that men do not suffer, then it is a "facially neutral" program.

Unlike in *Satty*, the *Hayes* formulation does not require proof that the program is justified as a business necessity; the *Hayes* court simply declared that fetal protection is a justification for discrimination on the basis of pregnancy in the first instance. 726 F.2d at 1552, n. 14. While the court characterized fetal protection as "an affirmative defense" which must be raised after rebuttal of the "prima facie" case of discrimination (726 F.2d at 1552), the court also recognized that proof of this defense is obviated by the fact that it is the very justification that was used to "rebut" the prima facie case of disparate treatment in the first instance:

> The employer's business necessity defense applies automatically, just as the employee's prima facie case of disparate impact applies automatically. That is because to reach the disparate impact stage of analysis in a fetal protection case, the employer has *already* proved – to overcome the presumption of facial discrimination –

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Eleventh Circuit's analysis, since precisely the same analysis would have been possible under this Court's *Gilbert-Satty* formulation.

> that its policy is justified on a scientific basis and addresses a harm that does not affect men. To add any more requirements would be to render it nearly impossible to have a fetal protection program under any circumstances. 726 F.2d at 1553; emphasis in original.

In effect, then, under *Hayes* there is no need for an employer to demonstrate that fetal protection is a business necessity at all. An employer need only show proof that fetuses are at risk and that only women need shoulder the burden of the program in order to carry out the program's purposes. Upon such a showing, the employer has not only rebutted the "prima facie" case of sex discrimination, but will also be *deemed* to have proven business necessity.

The Eleventh Circuit also suggested that, if an employer cannot demonstrate that exclusion of women alone is necessary to protect fetuses, *then* the policy is facially discriminatory, and the employer must prove that nonpregnancy is a bfoq. 726 F.2d at 1549. Despite the superficial symmetry of the court's approach, the analysis is fundamentally flawed. If an employer is unable to show that the offspring of male employees are at risk, then the employer has, perforce, proven "classic" overt discrimination on the basis of sex, and the inquiry necessarily ends there. Even the hypothetical bfoq defense suggested by the court (726 F.2d at 1549, n. 9) would not be a defense to discrimination based on *fetal protection*; it would be a defense to an exclusion predicated on *pregnancy-related* incapacity, to which the court's fetal protection analysis would not apply in any event.[9]

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[9] The only situation in which the court's analysis would make analytical sense would be a case in which the employer

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The irony of *Hayes* is that, in the court's *ad hoc*, if well-intentioned, efforts to force Title VII into a formulation which would achieve the court's desired result, the court arrives at a methodology which actually negates its implicit thesis, viz., that Congress must have intended that fetal safety constitute a justification for discrimination on the basis of pregnancy.

The unavoidable conclusion, from the court's "prima facie case" methodology, is that Title VII affirmatively *prohibits* employers from using fetal protection as a justification for excluding female employees in any case where the offspring of both male and female employees are at risk. Under the court's formulation, Title VII will permit employers to use fetal protection as a justification for excluding female employees only in those cases where it is solely the offspring of female employees that are at risk. Not only does the court's analysis impute a rather macabre reasoning process to Congress, but it compels the conclusion that Congress does not believe fetal safety to be a business *necessity* at all. Under the court's analysis, Congress not only expects that employers will ignore fetal safety in cases where the offspring of both male and female employees are at risk, Congress affirmatively *forbids* employers to protect unborn offspring, in such cases, by displacing women.

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justified categorical exclusion of pregnant women both on the ground of fetal protection and on the ground of pregnancy-related incapacity. In such a case, only the fetal protection justification would be analyzed according to the *Hayes* formulation; the "incapacity" justification would *separately* be analyzed under traditional bfoq analysis.

Finally, *Hayes'* treatment of fetal safety as a business justification is simply illogical. If fetal safety is not a sufficiently compelling business justification for excluding only female employees when the offspring of both male and female employees are at risk, how can it be said to be a sufficiently compelling justification to do so when it is only the offspring of female employees that are at risk? In this formulation, the sufficiency of fetal safety as a business justification for excluding pregnant women is determined, not by the reasons for the exclusion, but rather by who is excluded.

The holding of the Seventh Circuit below simply adopts, without significant analysis, the results of *Wright* and *Hayes*. *International Union, UAW v. Johnson*, 886 F.2d 871, 883-886 (7th Cir. 1989) (*International Union*). In *dictum*, however, the court opined that Johnson's fetal protection program could be justified under a bfoq analysis. *International Union, supra*, 886 F.2d at 893-901. In its analysis, the court relied on its earlier decision in *Torres v. Wisconsin Dept. of Health & Social Services*, 859 F.2d 1523 (7th Cir. 1988) for the proposition that Johnson's FPP rests on objective differences between men and women: "*Torres'* conclusion that Congress intended the bona fide occupational qualification defense as a recognition of the real differences between men and women accords with Congress' approach in both Title VII and other contexts concerning matters involving distinctions based upon realistic physical differences between men and women." *International Union*, 886 F.2d at 894.

However, Johnson Controls' fetal protection program does not discriminate on the basis of "objective differences" between men and women; it discriminates on the

basis of paternalistic and stereotypic notions of women. Whereas the fact that women are biologically capable of becoming pregnant is concededly a difference between men and women, that is not the basis of the employer's discriminatory policy. Johnson's policy is to exclude women, not because they are *pregnant*, but because they are *fertile women*.

From the perspective of fetal protection, *until* a fertile woman becomes pregnant, she stands in precisely the same position as a fertile man; in either case, the danger to unborn offspring is nonexistent, or, at least, comparable (assuming that there may be some adverse effect on gametogenesis posed by exposure to lead compounds.) It is not the abstract fact that women are *biologically capable* of becoming pregnant which supposedly requires the exclusion of women, but rather the chance that they *will become* pregnant – a factor speaking more about the ability of women to control their lives and their bodies than about "objective" biological distinctions.

By excluding all women solely on the basis of fertility, Johnson, with the approval of the Seventh Circuit, makes at least the following assumptions about women – none of which has anything whatsoever to do with "objective differences" between men and women: (1) that all unmarried fertile women are either presently actively involved in sexual relationships with men, or will definitely become so involved; (2) that fertile women who are actively involved in sexual relationships with men or who may become so involved, are or will be involved with a *fertile* man (a woman's partner, for example, might have had a vasectomy); (3) that fertile women who are actively involved in sexual relationships with a fertile

man, or will become so, cannot be trusted to employ reasonably adequate prophylactic measures against an unexpected pregnancy; and (4) that fertile women, even when possessed of sufficient information about the work-site hazard, are incapable of properly weighing the changes of unexpected pregnancy, notwithstanding use of prophylactic measures, against the possibility of fetal hazard should she become pregnant.

Furthermore, Johnson's policy presumes that Johnson is better suited to safeguard the interests of a woman's future offspring, should there be an unexpected pregnancy, than is the woman herself. This is manifest paternalism, a self-proclaimed prerogative of protecting unborn children from the presumed folly of their mothers.

Amici are aware of no authority for the proposition that employers are somehow invested with the status of a private *parens patriae* entitling them to substitute their judgment concerning the welfare of unborn offspring for that of the mother. Nevertheless, the Seventh Circuit endorsed the notion that society's interest in fetal safety is best served, not by fully informing women of the risks involved and allowing them to make informed choices, but rather by removing from women the opportunity to make any choices in the matter at all. 886 F.2d at 897.[10]

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[10] The Seventh Circuit stated: "Since they have become a force in the workplace as well as in the home because of their desire to better the family's station in life, *it would not be improbable* that a female employee might somehow rationally discount this clear risk in the hope and belief that her infant would not be adversely affected from lead exposure." 886 F.2d

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Distilled to its essence, this is not discrimination based on "objective differences" between men and women, it is discrimination based on categorical assumptions about the ability of women to govern their sexuality and about the comparative ability of women to make reasoned, informed choices. With absolutely no disrespect intended, Amici would point out that if an applicant for one of the affected jobs at Globe Union were a fertile *nun*, Johnson's purported justification for excluding her from the job – fetal protection – would manifestly be far from persuasive; or alternatively, it would be far more evident that Johnson's concern is less with biological differences and more with the possibility that the women would violate her vow of celibacy. See *Johnson Controls, Inc. v. California Fair Employment and Housing Commission, supra*, 218 Cal.App.3d 517, 551 n.16, 267 Cal.Rptr. 158. A fetal protection policy such as Johnson's does not treat women as individuals, but implicitly concedes to *all* women a capacity to exercise judgment little

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at 897 (emphasis added). This "lack of improbability" that a woman "might somehow" choose continued hazardous employment over the wellbeing of her offspring was considered sufficient by the court to divest all fertile women of the opportunity to make an informed choice in the matter. In stark contrast to this assumed inability of working women fairly to consider the best interests of their offspring, stands the obvious *probability* that an employer would ignore potential hazards to fetuses altogether in some cases, viz., where fetal safety would require displacement of *both* male and female employees. Nevertheless, it is assumed that the employer, rather than the woman, is better suited to act in the best interests of fetuses on behalf of society.

better than that of rabbits: Any woman who *can* become pregnant *will* become pregnant. The Seventh Circuit recognized that "a determination of whether a proposed BFOQ is 'reasonably necessary' to furthering the objective of industrial safety requires that Johnson Controls ' " 'had reasonable cause for believing that all or substantially all [women capable of pregnancy] would be unable to perform safely and efficiently the duties of the job involved.' " ' " 886 F.2d at 897 (citations omitted). However, the court appears to have ignored the fact that there was no evidence whatsoever that all or substantially all fertile female applicants for the disputed jobs *would* become pregnant and, therefore, would pose the risk asserted.[11] The court, like Johnson itself, appears merely to have assumed this to be the case, proceeding then to justify depriving women of the opportunity to make an informed choice. 886 F.2d at 897.

B. Neither Society's Interest In Workplace Fetal Safety Nor Its Interest In Equal Employment Opportunity For Women Are Adequately Served By Allowing Employers To Discriminate Against Women In Purported Furtherance Of Fetal Safety

Johnson Controls insists that its fetal protection program excludes only women from certain jobs because only women need to be excluded from these jobs in order to protect fetal health. It should be obvious, however, that

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[11] The only evidence on this point appears to be that, in the four years between 1978 and 1982 in which Johnson utilized its informed-consent fetal protection policy, *six* women were known to have become pregnant. 886 F.2d at 876-877.

an employer will not *voluntarily* adopt a fetal protection program in any situation where the hazard to the fetus can be mediated through the bodies of both the mother and the father. In such a case, a *genuine* concern for fetal safety would call for the exclusion of *both* male and female employees – an obviously impracticable solution.

Where concern for fetal safety would require exclusion of both male and female employees, the employer will most likely, and not surprisingly, ignore the societal concern altogether, in favor of economic self-interest. Alternatively, an employer faced with such a dilemma might nevertheless choose to exclude only employees of one sex, and either (1) minimize the significance of scientific evidence that would argue for exclusion of both male and female employees, or (2) argue that fetal safety justifies exclusion only of women, even though societal interest in fetal safety would be *better* served by exclusion of both male and female employees.

If fetal safety suffices to excuse sex discrimination when only women need be excluded to satisfy society's concerns, so the argument would go, fetal safety should suffice to excuse sex discrimination even when both men and women should be excluded. Society's interest in fetal safety is not gender-specific.

To be sure, a self-serving choice to exclude only women, when both men and women should be excluded, would be challenged as "classic" sex discrimination. But, in any subsequent Title VII litigation testing the validity of such a practice, a court would have only two options: Either excuse the discriminatory practice, or enjoin the

discrimination. An order requiring an employer to exclude all employees or none would obviously be met with a choice for the latter option.

In any case, what is clear is that, under any of these alternative scenarios, one or another of society's interests is always sacrificed. Where employers are permitted to exclude women pursuant to voluntarily-adopted fetal protection programs, it is never *society's* interest that is being served at all, but is rather always the economic self-interest of the *employer*. An employer is free wholly to ignore society's interest in fetal safety (except as mandated by law) whenever a decision voluntarily to vindicate that societal interest would dis-serve economic self-interest.

Similarly, a court which enjoins "classic" sex discrimination, in a case where both male and female employees should be excluded in the interests of fetal safety, abandons the societal interest in fetal safety in favor of society's interest in equal employment opportunities. Alternatively, a court which excuses "classic" sex discrimination against women, in a case where both male and female employees should be excluded in the interests of fetal safety, compromises *both* society's interest in fetal safety *and* society's interest in equal employment opportunities.

For this reason, the fetal safety defense cannot be equated to the third-party safety or privacy defenses. *Cf., Western Air Lines v. Criswell*, 472 U.S. 400 (1985); *Dothard v. Rawlinson*, 433 U.S. 321 (1977); *Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d 224 (5th Cir. 1976). In those cases, the safety interest urged in defense of discrimination was

asserted to be *necessary* to the safe operation of the enterprise.

Where fetal safety is concerned, however, the asserted safety interest is unrelated to the actual operational needs of the business and is purely a *convenience*, to be asserted by the employer or not – at the *employer's* sole option. Under the reasoning of Johnson here, fetal safety is either a burden an employer is under no obligation to assume at all, or it is a "business necessity" *if* an employer chooses to assume the responsibility.

Although employers may justify discrimination as serving society, it is, in every case, society that is the *loser*; the employer stands only to *gain* by employment discrimination in purported vindication of fetal safety. Moreover, at such point as an employer chooses voluntarily to assume responsibility for vindication of society's interest in fetal safety, it will always be *women* who lose.

Society unquestionably has a legitimate interest in workplace fetal safety, and government has agencies created to address that interest. See *International Union, supra* 886 F.2d at 920-921 (dis. opn. of Easterbrook, J.) Workplace fetal safety is *not*, however, an interest that can be incorporated into employment discrimination analysis without doing manifest violence not only to society's interest in fetal safety but also to society's interest in equal employment opportunities. Society's conflicting interests concerning the issue of workplace fetal safety and employment discrimination are *not* served by permitting employers an option to discriminate against women whenever it serves their economic self-interest to do so.

If the public's interest in equal employment opportunities for women is to be balanced against the public's interest in workplace fetal safety, it is for *Congress* to strike that balance – after considering *all* of the competing interests involved. The Courts cannot hope to balance all of those interests within the limited framework of Title VII.

CONCLUSION

For the reasons stated, Amici respectfully request that the Court reverse the decision of the Seventh Circuit below. Amici urge the Court to hold that, absent further action by Congress to amend Title VII, fetal protection alone does not excuse categorical discrimination of women on the basis of fertility or pregnancy.

DATED: May 23, 1990

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